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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

HILDEGARD PLETZ,

Petitioner,

v.

GEORGE F THOENY and PEGGY A. THOENY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED

I. Is a plaintiff who received an order of summary judgment in state trial court obligated by the Due Process Clause of the Fourteenth Amendment to give notice to the defendant of the entry of a new order and a decree enforcing the second order?

II. Does the Due Process Clause of the Fourteenth Amendment require the creation of a federal evidentiary standard to determine whether sufficient notice of a motion has been given to parties in litigation in state trial courts?

LIST OF PARTIES

The parties to the proceedings below were the following: The Petitioner, Hildegard Pletz; and the Respondents, George F. Thoeny and Peggy A. Thoeny.

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HILDEGARD PLETZ,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner Hilegard Pletz respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled proceeding on the 11th day of July, 1996.

OPINIONS BELOW

No opinions have been reported. The opinion of the Commissioner of the Court of Appeals of Washington affirming the judgment of the Superior Court of Cowlitz County and the Order of the Supreme Court of the State of Washington denying Petitioner's Petition for Review are set forth in the Appendix.

JURISDICTION

The jurisdiction of this court to review the July 11, 1996, Order of the Supreme Court of the State of Washington denying Petitioner's Petition for Review arises under 28 U.S.C. § 1257, which provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the

> United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, Treaties, or Laws of the United States . . .

RULE 29.4(C) STATEMENT

Petitioner seeks to question the validity of a Washington state statute, Wash. Civ. R. 5(a) and (b). The State is not a party to this action. Accordingly, 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATUTES INVOLVED

Wash. Civ. R. 5:

> (a) Service - When Required. . . . [E]very written motion

> other than the one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.
> * * *
> (b)(2) Service by Mail.
> (A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail . . . .
> (B) Proof of Service by Mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney.

Wash. Civ. R. 60(b):

> On motion and upon such terms as are just, the Court may relieve the party or his legal representatives from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; . . . .

Wash. Civ. R. 60(e)(1):

> Application [for relief from judgment] shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the Affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be defendant, the facts constituting a defense to the action or proceeding.

STATEMENT OF THE CASE

Petitioner was born in Poland and spent part of her childhood in German concentration camps. She moved to the United States as a child and settled in Cowlitz County, Washington. Petitioner with her husband jointly owned the property in Cowlitz County, Washington, that is the subject of this action. Following a bitter divorce in 1990, Petitioner retained a portion of the property. Her husband held the remainder

of the property and an easement across Petitioner's land. Petitioner leased her property to Respondents for farming and continues to live in a house on the property.

On September 25, 1992, Petitioner's ex-husband assaulted her, breaking her jaw and severely damaging her dental implants. Respondents approached Petitioner in February, 1993, offering to purchase her property. Fanning the flames, Respondents suggested to Petitioner that she sell her property and move to Australia where her son lives so her ex-husband could no longer do her any harm. Petitioner then learned that her ex-husband had sold his portion of the property. Believing that he would no longer be around to threaten her, Petitioner decided not to sell her property to Respondents at that time.

Petitioner left to visit her son in Australia in November, 1993, where she was hospitalized for blood poisoning and required surgery to correct an abscess in her jaw. Upon returning to her home in January, 1994, Petitioner found that her house had been burglarized. Under belief of further harm from her ex-husband, Petitioner signed an earnest money receipt and agreement on January 13, 1994, to convey her property to Respondents. Petitioner soon discovered that her ex-husband was terminally ill and requested that the sale be canceled, believing that her ex-husband was no longer going to harm her.

On February 16, 1994, Respondents filed a Complaint in the Cowlitz County Superior Court for specific performance and consequential damages. On March 18, 1994, Petitioner answered, claiming

defenses of incapacity and mistake, and counter-claimed seeking rescission of the earnest money agreement. On June 1, 1994, Petitioner discharged her counsel and proceeded pro se, believing that God would protect her interests.

In June of 1994, Petitioner spoke with Respondents and, based upon statements made at the time, believed that the dispute had been resolved and that no further action would be taken by the Respondents in court. On July 13, 1994, Respondents filed a Motion for Summary Judgment in Cowlitz County Superior Court requesting only specific performance. The court signed an Order on Motion for Summary Judgment on September 9, 1994, which was accompanied by a signed certificate of mailing. The order granted Respondents only specific performance and no other remedy.

Realizing the folly of failing to request additional remedies, twelve days later Respondents effectively withdrew the original order and substituted a new order granting specific performance, a hearing on consequential damages, and attorneys fees. The court signed both the second order and a final decree to enforce the second order on the day of their submission to the court. Neither the second order nor the decree was accompanied by a certificate of mailing, and no notice was given to Petitioner of the substitution of order and the issuance of a decree based upon the second order.

On October 12, 1994, Petitioner filed a timely Motion for Relief in the Cowlitz County Superior Court under Wash. Civ. R. 60(b). The Motion for Relief was

denied on November 4, 1994,[1] followed by a timely Motion for Reconsideration. At that time Petitioner submitted affidavits showing chronic mis-delivery of mail intended for Petitioner.

Petitioner filed a timely appeal in the Washington Court of Appeals. Petitioner pointed out the chronic mis-handling of her mail by the United States Postal Service repeatedly in her brief. Petitioner asserted that the lack of notice of the Order Granting Partial Summary Judgment and the accompanying Decree constituted grounds for relief. Petitioner also asserted that the lack of notice resulted in a lost opportunity for her to present evidence at a fair hearing. The Court of Appeals made an

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[1] See "Order Denying Defendant's Motion to Vacate and Granting Plaintiff's Judgment for Damages," set forth in the Appendix at p. 29.

unpublished ruling affirming the judgment of the trial court for insufficient evidence of Petitioner's lack of notice of the proceedings.[2]

Petitioner then filed a timely appeal with the Washington Supreme Court. Petitioner pointed out the lack of notice once again. Petitioner argued in the Petition for Review to Washington Supreme Court that the lack of notice denied Petitioner her right to a fair hearing. Otherwise the issue was not argued before any court. The Petition for Review to the Washington Supreme Court was denied on July 11, 1996.[3]

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[2] See "Ruling Affirming Judgment," set forth in the Appendix at p. 33.

[3] See "Order," set forth in the Appendix at p. 50.

ARGUMENT FOR ALLOWING WRIT

I. A plaintiff who received an order of summary judgment in state trial court is obligated by the Due Process Clause of the Fourteenth Amendment to give notice to the defendant of the entry of a new order and a decree enforcing the second order.

"A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." Logan v. Zimmerman Brush Company, 455 U.S. 422, 434-35, 102 S. Ct. 1148, 1157, 71 L. Ed. 2d 265, 277 (1982) (state law limited appeal of entitlement termination to independent tort action). As with termination of an entitlement, the failure of a plaintiff to give adequate notice of modifications to an order

violates Due Process under the Fourteenth Amendment. To give effect to the requirements of Due Process, a party must be given notice at every stage of the proceeding in which the party's property rights may be adversely affected. The remedy for a violation of party's Procedural Due Process right to notice is to rescind any order given and to hold a new hearing.

A. Procedural Due Process requires that notice be given to a party at any stage of the proceedings in which a decree affecting a party's property rights may be issued.

The fundamental requirement of Due Process is that notice and an opportunity to be heard must be given to a person whose property rights may be deprived by the action of a court. Greene v.

Lindsey, 456 U.S. 444, 449, 102 S. Ct. 1874, 1877- 78, 72 L. Ed. 2d 249, 255 (1982); Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556, 569-70 (1972), rehearing denied sub nom, Parham v. Cortese, 409 U.S. 902 (1972). The failure to give notice to a party results in the potential loss of one of the fundamental interests of Due Process: the ability to defend one's rights. See Carey v. Piphus, 435 U.S. 247, 259, 98 S. Ct. 1042, 1050, 55 L. Ed 2d 252, 262 (1978) (protection against mistaken or unjustified deprivation). Federal law therefore prohibits the deprivation of property interests without notice and an opportunity to be heard.

This case demonstrates the risk of erroneous deprivation awaiting defendants against whom an order has been entered while an decree to enforce the judgment

has not issued. Here, the Respondents received an order for which notice was properly given, and subsequently substituted a new order upon which a decree was issued, without any notice to Petitioner of the massive substantive changes.

The entry of a new or modified order causing the party to incur additional obligations, such as the payment of consequential damages following an original order only ordering the conveyance of real property, is a new deprivation for which notice must be given. Procedural Due Process' goal of fundamental fairness would be satisfied by a requirement that notice be given prior to modification of an order before entry of a decree for its enforcement.

A practical analogy is the following scenario: plaintiff's attorney sends a

proposed order to defendant's attorney, makes substantive changes to the proposed order without sending a revised copy to defendant's attorney, presents the substantively different order to the court at a hearing, and the court signs the order. Due Process concerns of fairness and failure to give notice and an opportunity to be heard on the modifications would be raised by such outrageous attorney conduct. Those concerns are no less apparent here.

Due Process encompasses these facts, requiring that fair notice of issues and motions to be raised be given to the opposing party. In re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117, 122 (1968), rehearing denied, 391 U.S. 961 (1968) (quasi-criminal disbarment of attorney). Notice could be accomplished by a mailing to the opposing

party, a method which this Court has held satisfies the requirements of notice and Due Process. Tulsa Prof. Coll. Serv. v. Pope, 485 U.S. 478, 490, 108 S. Ct. 1340, 1347, 99 L. Ed. 2d 565, 578 (1988). Remembering to serve a modified order upon an opposing party is a procedure to which attorneys are long-accustomed.

The alternative, requiring parties to daily investigate case files in the state courts, places an unnecessary burden on the administration of the state courts and also fails to satisfy the Procedural Due Process requirement that the party seeking relief give notice. In contrast, the only burden placed upon parties by requiring notice of a modification to an order is that the party place a certificate of service in the document, mail the document to the party, and present the document with a

certificate of service to the court for filing after a sufficient waiting period. This places little additional burden upon the courts, requiring the court personnel simply to reject papers not containing a certificate of service.

B. The remedy for a state trial court's entry of an order and decree without actual notice being given to a party is for the order and decree to be withdrawn and for a new hearing to be held.

When an order or decree has been entered against a party by a state trial court in violation of the party's Procedural Due Process rights, relegation of the offended party to an appeals process is an improper remedy. The appeals process shifts the burden of proof to the party whose rights were violated and results in the potential

foreclosure of presentation of relevant issues and later appeals by that party. Therefore, the appropriate remedy for entry of judgment or modification in violation of a party's Procedural Due Process rights to notice an opportunity to be heard is withdrawal of the offending order and decree, and the holding of a new hearing on the matter.

The subsequent relief procedure offered by a state trial court to force a withdrawal of an offending order and decree is an inadequate remedy for a violation of a party's Due Process rights. In the State of Washington, the burden of production in the hearing to withdraw a summary judgment is on the moving party to show the absence of any material fact. Altherton Condominium Apartment - Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wash. 2d 506, 516,

799 P.2d 250, 257 (1990). Because this burden of proof would not have been shifted if the offended party had been given notice and opportunity to be heard prior to the entry of the offending judgment, it is an improper remedy to relegate the party to such a proceeding. Armstrong v. Manzo, 380 U.S. 545, 551-52, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965).

An order nunc pro tunc fails to act as an adequate remedy for violation of a party's Procedural Due Process rights to notice and opportunity to be heard. A nunc pro tunc order cannot be used for reasons other than the correction of ministerial and clerical errors in the state courts. Pratt v. Pratt, 99 Wash. 2d 905, 909, 665 P.2d 400, 402 (1983). Therefore, a nunc pro tunc order cannot be used to alter the substance or terms

of a previously-entered judgment that violates a party's Due Process rights. City of Pasco v. Napier, 109 Wash. 2d 769, 775, 755 P.2d 170, 172 (1988). No other state court procedural remedy exists that would be applicable to remedy a modification wrongfully entered into an order without notice and opportunity be heard.

Therefore, the only remedy for violation of a party's Due Process rights to notice an opportunity to be heard prior to the entry of a new or modified order is to require the withdrawal of the offending order and decree. This Court has held that "only wip[ing] the slate clean . . . would have restored the Petitioner to the position he would have occupied had due process of law been accorded to him in the first place." Peralta v. Medical Center, Inc., 485 U.S.

80, 87, 108 S. Ct. 897, 900, 99 L. Ed. 2d 75, 82 (1988) (setting aside a default judgment). As all other remedies are insufficient, violation of a party's Procedural Due Process rights by entry of modification to an existing judgment requires that the decree issued on the amended judgment be withdrawn and a new hearing be held.

II. The Due Process Clause of the Fourteenth Amendment Requires the Development of a Federal Evidentiary Standard for Proof of Notice.

Due Process requires that a party receive notice prior to the deprivation of a property interest so the party has an opportunity to be heard. Fuentes, 407 U.S. at 80, 92 S. Ct. at 1994, 32 L. Ed. 2d at 569; Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed.

2d 18, 32 (1976). While the means of achieving notice to a party has frequently been decided upon by this Court, the sufficiency of proof of notice to an opposing party has been a neglected child. Greene, 456 U.S. at 451-52, 102 S. Ct. at 1879, 72 L. Ed. 2d at 256; Tulsa, 485 U.S. at 490, 108 S. Ct. at 1347, 99 L. Ed. 2d at 578 (recognizing mail service as satisfying requirements of Procedural Due Process). Proof that notice has been given to an opposing party is a matter that until now has been left to state law to determine. Because state law fails to take account of the insufficiencies of service by mail, this court should develop a federal standard for proof of notice.

State law wrongfully presumes that mailing is a wholly effective means of providing notice to an opposing party.

See, e.g., Wash. Civ. R. 5(b)(2)(B) (service deemed-accomplished on the third day following mailing, proof by written affidavit of the person mailing). A rule presuming timely notice written at a time when most cases were handled by attorneys in the same town and all mail was hand-sorted and hand-delivered simply is not responsive to the needs of the modern world. When attorneys and their represented parties are, as here, located in different states or even countries, when letters often take a full week to cross from one city to another within the same state, when the postal service is criticized for its misplacement of millions of pieces of mail annually, a presumption that mailing alone is sufficient to provide timely notice cannot function to satisfy Due Process. Greene, 456 U.S. at 456, 102 S. Ct. at

1881, 72 L. Ed. 2d at 259 (O'Connor, J., dissenting).

The inadequacy of the presumption of notice upon mailing is evident especially in the circumstances of this case, where the evidence demonstrated that mailing to the Petitioner was unreliable at best. Mail to Petitioner's address was frequently rerouted to another location, delaying its eventual receipt by Petitioner for days if it was received at all. To better ensure that parties' Procedural Due Process rights are protected, this Court should develop a federal evidentiary standard for proof of notice. As this Court stated in Norris v. Alabama, 294 U.S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074, 1077 (1935),

> [w]hen a Federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also

> whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made.

Protection of the federal right to Procedural Due Process through the Fourteenth Amendment could be best accomplished by requiring that any document filed with a state trial court and required to be served as part of the proceeding affecting substantive rights of an opposing party (i.e. motion for summary judgment, modification of a judgment) be accompanied by a signed certificate of service or mailing.

In addition such documents should be sent by certified mail with return receipt requested. Mailing with return receipt by certified mail could then result in a presumption of service. Failure to mail such documents by certified mail with return receipt

requested would result in the presumption of effective notice not operating. The additional costs of mailing certified with return receipt would be minimal when compared with the cost of a violation of a party's Procedural Due Process rights with the resulting appeals process. Requiring signed certificates of mailing and mailing by certified mail with return receipt would satisfy the requirements of Procedural Due Process and serve the interests of the state courts.

CONCLUSION

For all of the reasons presented herein, this Petition for Writ of Certiorari should be granted. The existing state methods for proving notice by mail and the existing state remedies for violation of Procedural Due Process for failing to give notice do

not comply with the requirements of Due Process under the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parts. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in

the manner provided for service of summons in rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service--How made.

(1) On attorney or party. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if

no address is known, filing with the clerk of the court an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service on an attorney is subject to the restrictions in subsections (b)(4) and (5) of this rule and in rule 71, Withdrawal by Attorneys.

(2) Service by Mail.

(A) How Made. If service is made by mail, the papers shall be

deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday, or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday, or legal holiday, following the third day.

(B) Proof of Service by Mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form

substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing _____ to [John Smith], [plaintiff's] attorney, at [office address or residence], and to [Joseph Doe], and additional [defendant's] attorney [or attorneys] at [office address or residence], postage prepaid, on [date].

_____
[John Brown]
Attorney for [Defendant]
William Noe

(3) Service on Nonresidents. Where a plaintiff or defendant who has appeared resides outside the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk of the court for him. Where a party, whether resident or nonresident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. If the attorney does not have an office within the state or has removed his residence from the state, the service

may be upon him personally either within or without the state, or by mail to him at either his place of residence or his office, if either is known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. If the residence of neither the party nor his attorney is known, an affidavit of the attempt to serve shall be filed with the clerk of the court.

(4) Service on Attorney Restricted After Final Judgment. A party, rather than the party's attorney, must be served if the final judgment or decree has been entered and the time for filing an appeal has expired, or if an appeal has been taken (i) after the final judgment or decree upon remand has been entered or (ii) after the mandate has been issued affirming the judgment or decree or

disposing of the case in a manner calling for no further action by the trial court. This rule is subject to the exceptions defined in subsection (b)(6).

(5) Required Notice to a Party. If a party is served under circumstances described in subsection (b)(4), the paper shall (i) include a notice to the party of the right to file written opposition or a response, the time within which such opposition or response must be filed, and the place where it must be filed; (ii) state that failure to respond may result in the requested relief being granted; and (iii) state that the paper has not been served on that party's lawyer.

(6) Exceptions. An attorney may be served notwithstanding subsection (b)(4) of this rule if (i) fewer than 63 days have elapsed since the filing of any paper or the issuance of any process in

the action or proceeding or (ii) if the attorney has filed a notice of continuing representation.

(c) Service--Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing.

(1) Time. Complaints shall be filed as provided in rule 3(a). Except as provided for discovery materials in section (i) of this rule and for documents accompanying a notice under ER 904(b), all pleadings and other papers after the complaint required to be served upon a party shall be filed with the court either before service or promptly thereafter.

(2) Sanctions. The effect of failing to file a complaint is governed by rule 3. If a party fails to file any other pleading or paper under this rule, the court upon 5 days' notice of motion for sanctions may dismiss the action or strike the pleading or other paper and grant judgment against the defaulting party for costs and terms including a reasonable attorney fee unless good cause

is shown for, or justice requires, the granting of an extension of time.

(3) Limitation. No sanction shall be imposed if prior to the hearing the pleading or paper other than the complaint is filed and the moving attorney is notified of the filing before he leaves the office for the hearing.

(4) Nonpayment. No further action shall be taken in the pending action and no subsequent pleading or other paper shall be filed until the judgment is paid. No subsequent action shall be commenced upon the same subject matter until the judgment has been paid.

(e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with

him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted if permitted elsewhere in these or other ruled of court, or if authorized by the clerk of the receiving court. The clerk may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules or practices.

(f) Other Methods of Service. Service of all papers other than the summons and other process may also be made as authorized by statute.

(g) Certified Mail. Whenever the used of "registered" mail is authorized by statutes relating to judicial proceedings or by rule of court,

"certified" mail, with return receipt requested, may be used.

(h) Service of Papers by Telegraph. Any writ or order in any civil suit or proceeding and all the papers requiring service may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ or order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects as the original thereof might be, if delivered to him, and the officer or person serving or executing the same shall have the same authority and be subject to the same liabilities as if the said copy were the original. The original, when a writ or order, shall also be filed in the court

from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent. In sending it, either the original or certified copy may be used by the operator for that purpose.

(i) Discovery Material Not to Be Filed; Exceptions. Depositions upon oral examinations, depositions upon written questions, interrogatories and responses thereto, requests for production or inspection and responses thereto, requests for admission and responses thereto, and other discovery requests and responses thereto shall not be filed with the court unless for use in a proceeding or trial or on order of the court.

(j) Filing by Facsimile. [Reserved. See GR 17--Facsimile Transmision.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been disccvered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been

reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was

entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of

Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be

served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time propr to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF COWLITZ

GEORGE F. THOENY and PEGGY A. THOENY, husband and wife,	)	No. 94-2-00216-4
Plaintiff,	)	ORDER ON MOTION FOR SUMMARY JUDGMENT
v.	)	
HILDEGARD PLETZ, a single woman,	)	
Defendant.	)	

Plaintiff's motion for summary judgment requiring specific performance was heard by the Honorable Don L. McCulloch on August 12, 1994. Plaintiff was represented by Regina Hauser, of Schwabe, Williamson & Wyatt, and defendant did not appear. Having reviewed the motion, affidavits of George Thoeny and Peggy Thoeny, plaintiffs' memorandum in support of summary judgment and allowed for oral argument,

IT IS HEREBY ORDERED that:

1. Plaintiff's motion is granted; and

2. A decree shall be entered in favor of plaintiffs that upon plaintiffs' tender to the court of $250,000, defendant is required to execute and deliver a statutory warranty deed transferring the subject property to plaintiffs.

In the event that the defendant does not execute and deliver a statutory warranty deed within 10 days of the deposit of the funds with the court, plaintiffs shall be entitled to obtain an instrument conveying the property by a

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judicial officer or commissioner of this Court.

DATED this [9] day of Sept, 1994.

[Don L. McCulloch]
DON L. McCULLOCH
Superior Court Judge

Presented by:

SCHWABE, WILLIAMSON & WYATT

By [Regina Hauser]
REGINA HAUSER, WSB #16074
Of Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF COWLITZ

GEORGE F. THEONY and PEGGY A. THOENY, husband and wife,,	)	
Plaintiffs,	)	No. 94-2-00216-4
v.	)	ORDER GRANTING PARTIAL SUMMARY JUDGMENT
HILDEGARD PLETZ, a single woman,	)	
Defendant.	)	

Plaintiff's motion for summary judgment requiring Defendant to specifically perform the terms of the Contract between the parties to the above-entitled case was heard by the Honorable Don L. McCulloch on August 12, 1994. Plaintiff was represented by Regina Hauser, of Schwabe, Williamson & Wyatt, and defendant did not appear. Having reviewed the motion, affidavits of George Thoeny and Peggy Thoeny, plaintiffs' memorandum in support of summary judgment and having allowed for

oral argument, no, therefore,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion is granted;

2. A decree shall be entered in favor of Plaintiffs as follows:

a. Plaintiffs shall obtain the funds held on deposit pursuant to the Order of this Court, and deliver the same to the Clerk of the above-entitled Court;

b. Defendant is required to execute a statutory warranty deed transferring the subject property to plaintiffs and deliver the same to the Clerk of the above-entitled Court; provided, however, that in the event that the Defendant does not execute and deliver a statutory warranty deed within 10 days if the service of the Decree upon her, Plaintiffs shall be entitled to obtain an instrument conveying the property by a judicial officer or commissioner of this

Court.

3. A hearing upon the amount of damages which the Plaintiffs claim to have sustained as a result of the breach by Defendant of her contract to convey title and possession of the subject property shall be held by motion and supporting affidavits. Plaintiffs shall cite the argument of the same before the above-entitled Court, and Defendant shall respond to the Plaintiffs' application in the same fashion as a response to any motion before the Court.

4. An award of costs and fees shall be made at the time of hearing upon

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Plaintiffs' application for Judgment for damages.

DATED this [21st] day of Sept 1994.

[Don L. McCulloch]
DON L. McCULLOCH
Superior Court Judge

Presented by:
SCHWABE, WILLIAMSON & WYATT

By [Lawrance L. Paulson] WSBA #19149
Steven B. Tubbs, WSBA# 7239
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF COWLITZ

GEORGE F. THEONY and PEGGY A. THOENY, husband and wife,, Plaintiffs, v. HILDEGARD PLETZ, a single woman, Defendant.	)	No. 94-2-00216-4 DECREE OF SPECIFIC PERFORMANCE

WHEREAS, an Order has been entered herein directing that a Decree of Specific Performance issue, Now, therefore,

It is HEREBY ORDERED AND DECREED that:

1. Plaintiffs shall obtain the funds held on deposit pursuant to the Order of this Court, and deliver the same to the Clerk of the above-entitled Court within ten days of the date of entry of this Decree;

2. Defendant is required to execute

a statutory warranty deed transferring the subject property to plaintiffs and deliver the same to the Clerk of the above-entitled Court; provided, however, that in the event that the Defendant does not execute and deliver a statutory warranty deed within 10 days of the service of the Decree upon her, Plaintiffs shall be entitled to obtain an instrument conveying the property by a judicial officer or commissioner of this Court.

DATED this [21st] day of Sept 1994.

[Don L. McCulloch]
Hon. Donald L.McCulloch
Superior Court Judge

Presented by:
SCHWABE, WILLIAMSON & WYATT

By [Lawrance L. Paulson] WSBA #19149
Steven B. Tubbs, WSBA# 7239
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF

WASHINGTON FOR THE COUNTY OF COWLITZ

GEORGE F. THEONY and PEGGY THOENY, husband and wife,,	)	
Plaintiffs,	)	No. 94-2-00216-4
v.	)	ORDER DENYING DEFENDANT'S MOTION TO VACATE AND GRANTING PLAINTIFF'S JUDGMENT FOR DAMAGES
HILDEGARD PLETZ, a single woman,	)	
Defendant.	)	

I. JUDGMENT SUMMARY

Judgment Creditor: George and Peggy Thoeny
Judgment Debtor: Hildegard Erna Pletz
Principal Judgment Amount: $27,266.00
Late Charges: $-0-
Interest to Date of Judgment: $-0-
Interest Rate After Judgment: 12%
Attorney's fees: $125.00
Costs: $594.90
Other Recovery Amounts: -0-
Attorney for Judgment Creditor: Steven B. Tubbs
Attorney for Judgment Debtors: Gary Bullock

This matter came before the above-entitled Court upon Motion by the Defendant to Vacate the Order Granting Partial Summary Judgment and Decree of

Specific Performance, and upon application of the Plaintiffs for a determination of damages.

The Plaintiffs were represented by Steven B. Tubbs of SCHWABE, WILLIAMSON & WYATT. The Defendant was represented by Mr. Wade Regier in association with Mr. John Petshow, both of BULLOCK & REGIER.

The Court considered the Declarations of Mr. Bullock, Ms. Pletz, and of Dr. Kenneth Guy Paltrow, offered by Defendant in support of her motion. The Court also considered the files and records of this proceeding, together with the Memoranda of Plaintiffs and Defendant. The Court also considered the argument of counsel for the parties.

IT IS HEREBY ORDERED as follows:

1. Defendant's Motion to Vacate is hereby denied.

2. A Judgment shall be entered in

favor of Plaintiffs and against Defendant in the sum of $27,266.00, together with Costs and Fees of $719.90 shall be entered; provided, however, that Satisfaction of said Judgment shall be obtained by withdrawal of said funds currently on deposit with the Clerk of this Court. The balance of funds remaining with the Clerk of the Court shall be released to Defendant.

3. The Warranty Deed filed with the Clerk of the Court by Defendant shall be released to Plaintiffs. Defendant shall

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immediately surrender possession of the premises to Plaintiffs.

DATED this [4] day of [Nov], 1994.

[Don L. McCulloch]
JUDGE

Presented by:

_____
STEVEN B. TUBBS, WSBA #7239
SCHWABE, WILLIAMSON & WYATT
Of Attorneys for Defendant

Approved as to form, receipt of true copy acknowledged, consent to entry given and notice of presentation waived this _____ day of _____, 1994.

_____
John Petshow, WSBA #_____

IN THE COURT OF APPEALS OF THE

STATE OF WASHINGTON

DIVISION II

GEORGE F. THOENY, etux,	)	
	)	
Respondent,	)	No. 18901-1-II
	)	
v.	)	RULING
	)	AFFIRMING
HILDEGARD PLETZ,	)	JUDGMENT
	)	
Appellant.	)	
	)	

Hildegard Pletz appeals a Cowlitz County Superior Court Order denying her motion to vacate an Order of Partial Summary Judgment and Decree of Specific Performance for the sale of real property. She argues that the trial court erred in not setting aside the judgment pursuant to CR 60(b). This court has reviewed the matter pursuant to the respondents' motion on the merits, as provided by RAP 18.14, and has determined that the appeal is clearly without merit.

Pletz obtained the property involved in 1990 as part of a divorce settlement. Her husband retained an adjoining piece of property, which he later sold to the Thoenys. Pletz and the Thoenys first discussed a sale of Pletz's land in February, 1993, the Thoenys offering $200.000.[1] Pletz ultimately rejected this offer.

Pletz renewed discussions in early 1994. She had spent the last part of 1993 in Australia, visiting her son. When she returned to the United Stats, in January, 1994, she learned that someone had broken into her house. Upset by the burglary, Pletz sent her step-grandson to the Thoenys with a message that she was again interested in selling the property. The Thoenys went to Pletz's house that

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[1]The Thoenys asserted below that Pletz initiated the discussions.

same afternoon, offering $220,000 for the property, but Pletz refused to sell for less than $250,000. The Thoenys agreed; the parties signed an earnest money agreement, and the Thoenys gave Pletz a check for $5,000.

Pletz continued to cooperate in the sale for several weeks. On January 20, 1994, she and the Thoenys met with Rick Onaindia, the Thoenys' banker. The purpose of the meeting was to assure Pletz that the Thoenys could obtain financing for the property. Later, when the Thoenys informed Pletz that the title report indicated encumbrances for two unsatisfied judgments, she had her attorney clear the title.

The period of cooperation ended on February 10, 1994, when Pletz told the Thoenys that she wanted to keep the property. In her deposition, she

asserted that she originally wanted to sell her property because of her fear of her former husband. Shortly after signing the earnest money agreement, she learned that her former husband had cancer and was confined to a nursing home. Since he was no longer a threat to her, she no longer had reason to sell the property.[2]

The Thoenys filed suit against Pletz on February 18, 1994, seeking specific performance of the contract and consequential damages. Pletz answered, raising the affirmative defenses of incapacity and mistake and seeking rescission of the purchase and sale agreement. However, in May, 1994, Pletz discharged her attorney, telling him that

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[2] Her ex-husband was in a nursing home from October, 1993 until his death in March, 1994.

she no longer wished to defend against the action. She also rejected his advice to retain substitute counsel and did nothing in the case thereafter.

On July 13, 1994, the Thoenys filed a Motion for summary judgment, mailing notice directly to Pletz. The motion was scheduled to be heard on August 12, 1994. Pletz did not appear, and on September 12, 1994, the trial court entered an order granting the Thoenys' motion for summary judgment and ordering conveyance of the property to them. On September 21, 1994, this order was followed by a second order, denominated a partial summary judgment, ordering Pletz to execute and deliver a statutory warranty deed to the Thoenys and requiring a hearing to determine whether the Thoenys were entitled to consequential damages.

After she received notice of the

second decree, Pletz contacted her former attorney, who filed a notice of appearance and a motion to vacate the judgment pursuant to CR 60, alleging mistake, excusable neglect and unavoidable casualty. The parties agreed to postpone the hearing on damages, and both matters were argued on October 24, 1994. The court denied Pletz's motion to vacate and awarded the Thoenys consequential damages of $27,266, along with costs and fees. On November 4, 1994, it denied Pletz's motion for reconsideration.

Pletz contends that the trial court erred in denying herrelief from the Decree of Specific Performance. This is a matter that rests within the trial court's discretion, and a reviewing court will not overturn the superior court's decision absent a showing of a clear and

manifest abuse of that discretion. Ebsary v. Pioneer Human Services, 59 Wn. App. 218, 225 (1990). See also In re Adamec, 100 Wn.2d 166, 173 (1983); Suburban Janitorial v. Clarke America, 72 Wn. App. 302, 305 (1993). Clear or manifest abuse exists only when no reasonable person would adopt the lower court's position. Morgan v. Burks, 17 Wn. App. 193, 197 (1977). See also Lindgren v. Lindgren, 58 Wn. App. 588 (1990), review denied, 16 Wn.2d 1009 (1991).

Pletz first asserts that she did not receive proper notice of the entry of the September 21 order. under CR 54(f)(2), no order or judgment shall be signed or entered until opposing counsel has been given 5 days notice of presentation and served with a copy of the proposed order or judgment (except in certain

circumstances inapplicable here).

Assuming that Pletz did not receive adequate norice, she nevertheless fails to show that the trial court erred in refusing to vacate the judgment. She does not assert that she did not receive notice of the September 12 order, and it addressed the matters she wishes to challenge. As to the second order, the only other matter addressed was the question of damages, and Pletz appeared and argued the merits of that issue. Under the circumstances, she has failed to demonstrate prejudice. Therefore, the trial court did not abuse its discretion inrefusing to vacate on the basis of this argument. Burton v. Ascol, 105 Wn.2d 344, 352-53 (1986).[3]

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[3] It is also questionable whether Pletz actually raises this issue below. It is not one of the grounds for vacation cited in her motion or accompanying

Pletz next contends that the trial court erred in denying her relief on the basis of surprise. She contends that she was unaware of the proceedings until September 23, 1994. CR 60(b)(1) authorizes the trial court to vacate a judgment or order upon a showing of "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." That subsection applies to irregularities relating to procedural defects unrelated to the merits of the case. In re Marriage of Tang, 57 Wn. App. at 654. An

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memorandum. This court does not have the transcript of the hearing, and Pletz appears to concede that she argued this ground. Having failed to present this issue to the trial court, she cannot raise it here. Long v. Odell, 60 Wn.2d 151, 153-54 (1962); Brunetti v. Reed, 70 Wn. App. 180, 184 n.1 (1993) (even constitutional issues may not be raised for the first time on appeal in a civil trial).

irregulairty under CR 60(b)(1) is "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner." Haller v. Wallis, 89 Wn.2d 539, 543 (1978).

The record indicates that Pletz was properly mailed a copy of the Thoenys' motion for summary judgment. A letter properly addressed, postage prepaid, and sent in the normal course of business, is presumed to have reached the addressee. Smith v. Favilla, 23 Wn. App. 59 (1979) (citing Lieb v. Webster, 30 Wn.2d 43 (1948)). Pletz asserts that she did not get the letter, arguing that it is "highly plausible" that the letter was misdirected to the previous box holder.

This is not enough to show an irregularity in the proceedings, particularly under the circumstances of the case. Pletz admits that she discharged her attorney a few months before the Thoenys filed their motion and that at that time, she had no intention of being further involved in the case. There is no evidence that she took any interest in the case thereafter, and it is as plausible to assume that she ignored or misplaced the letter, as to assume that it was misdirected. Rejection of "surprise" as a basis for vacation was not an abuse of discretion.

Neither is it excusable neglect to willfully fail to defend a claim. Bishop v. Illman, 14 Wn.2d 13, 17 (1942); Jacobsen v. Defiance Lumber Co., 142 Wash. 642, 645 (1927).

Pletz also claims that she was

unable to attend to her affairs because of unavoidable casualty, CR 60(b)(9), contending that she was mentally incapable of continuing with the lawsuit. She bases this argument on her several operations for a broken jaw and the stress in her life. The only medical evidence she submitted was the affidavit of a psychiatrist, Dr. Kenneth Paltrow, who opined that she suffers from an adjustment disorder, meaning that she has significant stressors, going back to her teenage years, and is susceptible to having people take advantage of her. Dr. Paltrow's diagnosis does not indicate that Pletz's condition prevented her from attending to her affairs or defending against the claims against her. The trial court was within its discretion in rejecting this argument.

Likewise without merit is the

contention that the superior court erred in failing to vacate the judgment under CR 60(b)(11). This rule permits the vacation of a judgment for any reason justifying relief from the operation of the judgment. The use of CR 60(b)(11) is to be "confined to situations involving extraordinary circumstances not covered by another section of the rule." Marriage of Tang, 57 Wn. App. 648, 655 (1990) (quoting In re Marriage of Yearout, 41 Wn. App. 897, 902 (1985). It does not apply here.

Finally, Pletz has not demonstrated that she has a meritorious defense to the underlying lawsuit. One seeking the vacation of a default judgment must allege and prove facts which constitute a prima facie defense to the action. Osborne v. Osborne, 60 Wn.2d 163 (1962); Lasell v. Beck, 34 Wn.2d 211 (1949);

Person v. Plough, 174 Wash. 160 (1933); Robertson v. Wise, 152 Wash. 624 (1929).

Pletz raised the affirmative defenses of lack of capacity and mistake, but she fails to adequately support them.[4] Mental competency is presumed; and the evidence of mental incompetency must be clear, cogent, and convincing. Tecklenburg v. Washington Gas & Electric Co., 40 Wn.2d 141 (1952). Pletz asserts that the affidavit of Dr. Paltrow identifies issues probative of her state of mind. However, as noted above, the doctor's affidavit does not show that she was incapable of exercising judgment and discretion. The record contains evidence to the contrary, in fact. She bargained

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[4] Arguably, these defenses are not available, because Pletz's failure to appear was willful. See Suburban Janitorial v. Clarke American, 72 Wn. App. 302, 305-6 (1993) (citing Calhoun v. Merritt, 46 Wn. App. 616,619 (1986).

to sell her property at a price $30,000 higher than the price offered by the Thoenys. Neither does the record support her assertion that the Thoenys took advantage of her. There is evidence that she initiated the discussions of sale on both occasions. Moreover, it was the Thoenys who told her that her former husband had sold his property, thus prompting her to rescind her first offer of sale. The trial court did not err.

There is also an insufficient showing of mistake. A unilateral mistake may be grounds for relieving a party from a contract if the other party knows or is charged with knowing of the mistake. Snap-On Tools Corp. v. Roberts, 35 Wn. App. 32, 35 (1983) (citing, inter alia, Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc., 22 Wn. App. 781, 784 (1979) and Puget Sound Nat'l Bank v. Selivanoff,

9 Wn. App. 676, 681 (1973)). Here, Pletz asserts that her sole reason for selling her property was to distance herself from her former husband, and that her belief that he remained a threat to her was a mistake. All that the record indicates, however, is that she decided to sell because of the burglary.[5] By her own admission, the Thoenys did not tell her he had visited them until after she had signed the earnest money agreement.

Pletz did not satisfy the requirements of CR 60(b), and the trial court did not abuse its discretion in denying the motion to vacate the summary judgment.

The Thoenys request attorney fees pursuant to RAP 18.1(a). They are

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[5] Pletz suggests that there was evidence her former husband broke into the house because, among other items, personal belongings if his were missing.

entitled to reasonable attorneys fees under the earnest money agreement. Accordingly, it is hereby

ORDERED that the judgment is affirmed. Respondent is awarded a reasonable attorney fees upon compliance with RAP 18.1(d).

DATED the [17th] day of [July], 1995.

Court Commissioner

cc: Gary M. Bullock
John M. Petshow
Steven B. Tubbs
Hon. Don L. McCulloch
Cowlitz Co Clerk
94-2-00216-4

THE SUPREME COURT OF WASHINGTON

GEORGE F. THOENY and PEGGY THOENY,	)	NO. 63674-5
Respondents,	)	ORDER
v.	)	C/A NO. 18901-1-II
HILDEGARD ERNA PLETZ,	)	
Petitioner.	)	

This matter came before the Court on its July 11, 1996, En Banc Conference. The Court considered the Petition for Review, Respondent's Request for Attorney Fees and the files herein;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied. Respondent's request for attorney fees is granted. The amount of the attorney fees will be determined by the Supreme Court Commissioner pursuant to RAP 18.1. Pursuant to RAP 18.1(d),

Respondent should file an affidavit with the Clerk of the Washington State Supreme Court.

DATED at Olympia, Washington this [11th] day of July, 1996.

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CHIEF JUSTICE